

HUSCH BLACKWELL

**Legal Issues with
College Athletics and
Title IX**



Overview

1. The athletics economic model continues to evolve (trends: more expensive, donors flee to NIL)
2. Back to basics on compliance?
3. What is keeping me busy lately?
4. Ensuring the volcano does not erupt

Michigan State trustee: No 'viable path' to swimming and diving return



Mike Ellis

Lansing State Journal

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EAST LANSING — Swimming and diving won't be returning to Michigan State University, a trustee said during a Friday board meeting, despite court rulings that the school is not in compliance with Title IX.

The university's swimming and diving programs for both men and women were cut in late 2020 amid the COVID-19 pandemic because, the school said, it could not afford to upgrade facilities to match other Big Ten universities.

An August 2022 court decision faulted the university for violating Title IX rules, which prohibit sexual discrimination in education, but stopped short of ordering the school to reinstate the program.

The program would need a major investment in facilities, something MSU Board Trustee Melanie Foster said MSU does not plan to do now.

Balow v. Michigan St. U., 24 F.4th 1051 **(6th Cir. 2022)**

- Student-athletes and MSU agree on the gender breakdown of the undergraduate student body as a whole
- Disagreement about number of male & female athletes
 - Plaintiff Argument: MSU counting females who don't have “genuine participation opportunities”

“Genuine Participation Opportunities”

- Rowing: “receive the same practice gear and competition gear and participate in the same training and conditioning activities as the rest of the team.”
- Women's track-and-field and cross-country athletes: “Although some athletes did not participate in any races, Title IX does not require that athletes participate in competitions to be counted . . . In determining participation opportunities, OCR includes ... those athletes who practice but may not compete . . . [B]ench warming’ is a fact of life in most sports.”



OCR: Who counts as an athletic participant?

- An athlete who receives institutional support normally offered to student athletes
- An athlete who participates in organized practices and team meetings
- An athlete who is listed on the team's squad or eligibility list for each sport
- An athlete who is injured but continues to receive financial aid based on athletic ability

Calculating the “Participation Gap”

- “MSU used **internal Title IX data** to calculate a participation gap of 12 before the elimination of the swimming-and-diving teams and 15 after the elimination of these teams.”
- “The student-athletes relied on data reported pursuant to the **Equity in Athletics Disclosure Act (EADA)** and web-roster data to calculate a participation gap of 25 in 2018–19 and 35 in 2019–20.”
- “at the preliminary-injunction stage, it may be appropriate to rely on EADA data to calculate the size of the participation gap.”

The tools you need for Equity in Athletics analysis

Get Data for One School

Search for a school to view general information and EADA statistical data.

Compare Data for Multiple Schools

Select up to four schools to see a side-by-side comparison of data for the most recent year.

Download Custom Data

Select the EADA statistical data you are interested in for one or more years and download data for a customized group of schools.

Generate Trend Data

Select a subject area and a question that you are interested in, and then see the answer for a selected year, build a table, and see a graph that shows the trend over time. You can customize your results by various institutional characteristics such as athletic sanctioning body, public or private, and state.

Download Data

Download the complete data file for all institutions from a single data collection. Files will include all data submitted by all institutions in the selected survey year.

“Substantial Proportionality”

- “The district court found that both the student-athletes’ calculation of the participation gap and MSU's calculation of the participation gap meet the substantial-proportionality threshold because they are **smaller than the average-size team** at MSU. The district court erred when it compared the participation gap to the size of the average team at MSU, rather than **the size of a viable team.**”
- “Based on the clear language of the guidance, **a viable team is not an average one, but is instead one ‘for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team.’**”

SPARTANS

Michigan State settles Title IX lawsuit with former women's swim and dive team members

Published: Jan. 14, 2023, 7:02 p.m.



LOCAL

Court makes landmark decision in favor of student-athletes in Title IX lawsuit against SDSU

by: [Domenick Candelieri](#)

Posted: Apr 13, 2023 / 10:00 PM PDT

Updated: Apr 13, 2023 / 11:13 PM PDT



Fisk v. San Diego State, 22-CV-173 TWR (MSB) (S.D. Cal. Apr. 12, 2023)

- Regs: “To the extent that [an institution] awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex **in proportion to the number of students of each sex participating in . . . intercollegiate athletics.**”
- Undergraduate trends + football = challenges
- “Plaintiffs allege that between 2018 and 2020, SDSU female student-athletes received over \$1.2 million less in athletic financial aid, and the male student-athletes received over \$1.2 million more, than they would have ‘if SDSU had granted aid in proportion to the number of students of each sex participating in intercollegiate athletics.’”

Standing

- “there are multiple ways to allege **injuries-in-fact** for Title IX financial aid claims (even if those injuries may not be redressable by particular types of relief) and the description of injuries-in-fact in other contexts can provide guidance here.”
- Court finds that collegiate female student-athletes bringing a Title IX disproportionate financial aid claim can allege an injury-in-fact by providing sufficient facts to show that: (1) a barrier deprived them of the opportunity to compete on an equal basis as the male student-athletes for a proportional pool of money; and (2) that they were able and ready to compete for that money.

What Is The Barrier?

- “Plaintiffs allege that they experienced a sex-based barrier because SDSU placed a ‘monetary cap on the amount of athletic financial aid women’s sports were permitted to award,’ which ‘resulted in unequal opportunities for athletic aid for female student-athletes’ **because the monetary caps were imposed on all women’s sports but only some of the men’s sports.** As such, female student-athletes had to compete for a disproportionately smaller pool of money. As for the woman’s rowing team, the Second Amended Complaint specifically alleges that before it was eliminated, **the monetary cap placed on the rowing team permitted it to have the equivalent of twenty athletic scholarships awarded to the female rowers—the women’s rowing coach was typically given a total dollar amount of athletic financial aid equivalent to fifteen in-state scholarships and five out-of-state scholarships.”**

What Is The Barrier?

- “They also allege that, if a proportional pool of money was available, at least some of that money could have been available to the rowing team: **while the number of scholarships given to the rowing team could not be increased, the amount of fifteen of the scholarships could have been increased (from in-state scholarship amounts to out-of-state scholarship amounts), such that the rowing team coach could have sought an increase in the financial aid allocated to the women’s rowing team that the rowing team members, in turn, could have competed for.”**

A Quick Detour

Business of Football: The Supreme Court Sends a Message to the NCAA

It's rare for sports cases to reach the highest court in the land, but a unanimous decision is a harbinger of much larger industry changes to come.

ANDREW BRANDT • JUN 29, 2021

Texas Name, Image, and Likeness Law Now Effective

Legal Updates



Texas House Bill 2804 dealing with athletics-related Name, Image, and Likeness issues (NIL) became effective on July 1, 2023. The following provides a summary of the new legislation.

Anti-retaliation

Under the revised state law, an athletic conference or association, including presumably the NCAA, is not allowed to prohibit or penalize a Texas institution or the institution's athletic program in any way for participating in name, image, or likeness activity authorized by state law. Setting the stage for a potential conflict, this provision was greeted with disapproval in a memorandum issued by the NCAA which directed schools to "adhere to NCAA legislation (or policy) when it conflicts with permissive state laws."

Professionals:



Scott Schneider

Partner



Jason J. Montgomery

Partner



TaRonda Randall

Senior Counsel



Name, Image, and Likeness & Title IX

- Athlete-facilitated agreements do not trigger Title IX concerns
- **Institution-facilitated or coordinated agreements directly affiliated with the institution likely warrant additional analysis**
- Commentators have speculated third-party compensation like booster club funds are subject to the same analysis
- Any direct assistance provided by the institution as it pertains to NIL must be equal between men and women

NCAA stumbles in 3rd Circuit arguments on pay for college athletes

The athletes aren't seeking market compensation, their lawyer assured appellate judges, estimating that they would be happy with "pocket money" of about \$2,000 a month.

[ALEXANDRA JONES](#) / February 15, 2023





Coordinator Summer To-Do List

1. Do you have a sense of whether athletics program cuts are in the offing?
2. If so, do you know where you stand on participation opportunities?
3. Do you know your FA numbers? If so, understand discrepancies?
4. Are you in the loop on evolving NIL approach? If so, assess Title IX implications?
5. Monitor developments

VIDEO: ESPN

ACLU





Radwan v. Manuel, 55 F.4th 101 (2d. Cir. 2022)

Found a triable issue of fact as to whether Radwan’s scholarship was terminated because of her sex.

- Specifically, Radwan had sufficiently detailed the ways in which misconduct by male athletes at UConn was not punished to the same degree.
- Significant: whereas the district court found that Radwan was not “similarly situated” to male athletes because she was not disciplined by the “same decisionmaker,” the Second Circuit rejected this interpretation. It recognized the structure of sex-segregated athletic teams where male and female athletes often have different coaches and discipliners, and thus could hardly ever be “similarly situated” under a “same decisionmaker” test.
- Question: What is the implication?

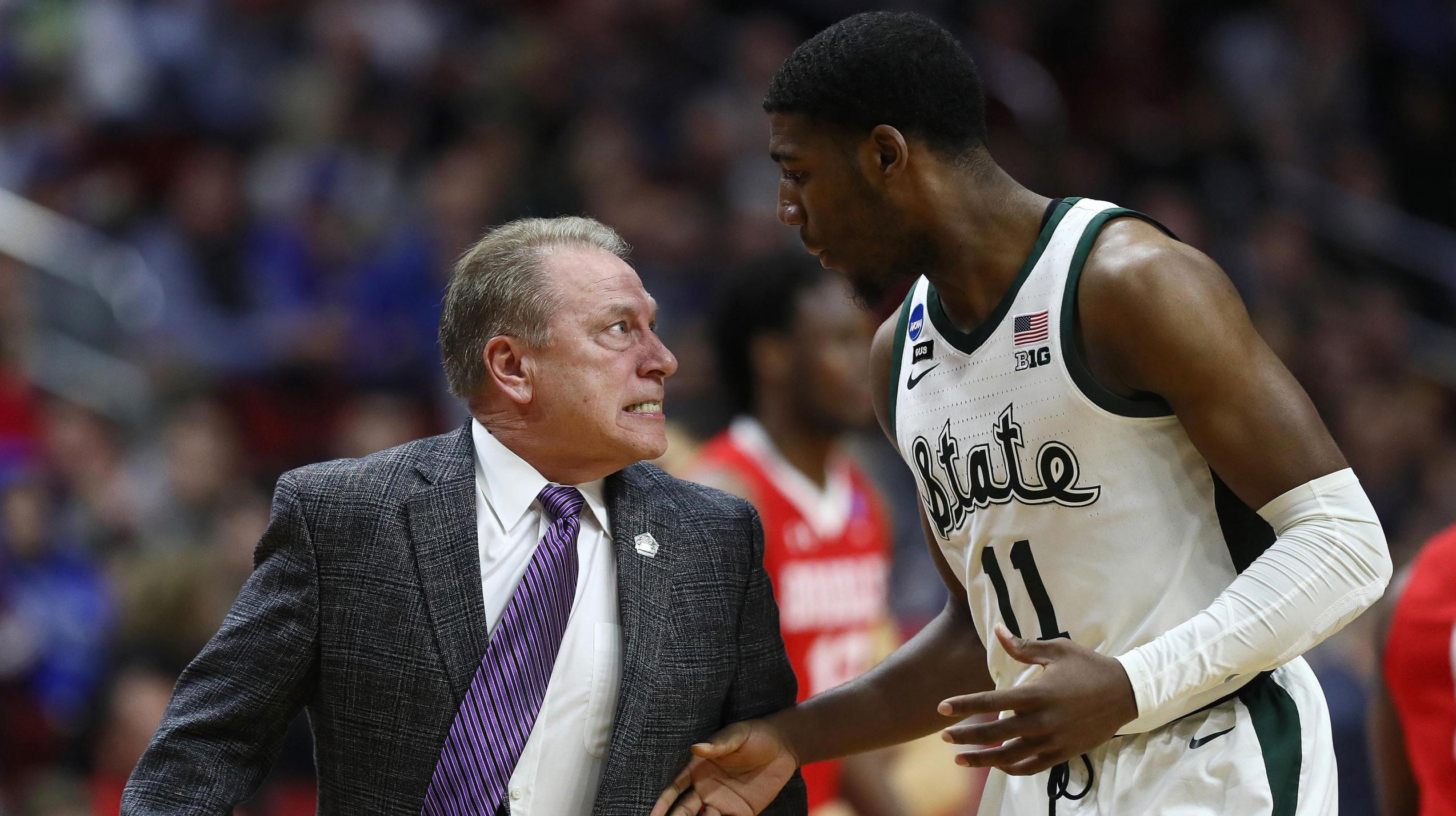
N Northwestern fires Pat Fitzgerald: Wildcats coach out amid hazing scandal as cultural issues exposed

A former Northwestern standout, Fitzgerald led the program for 17 seasons



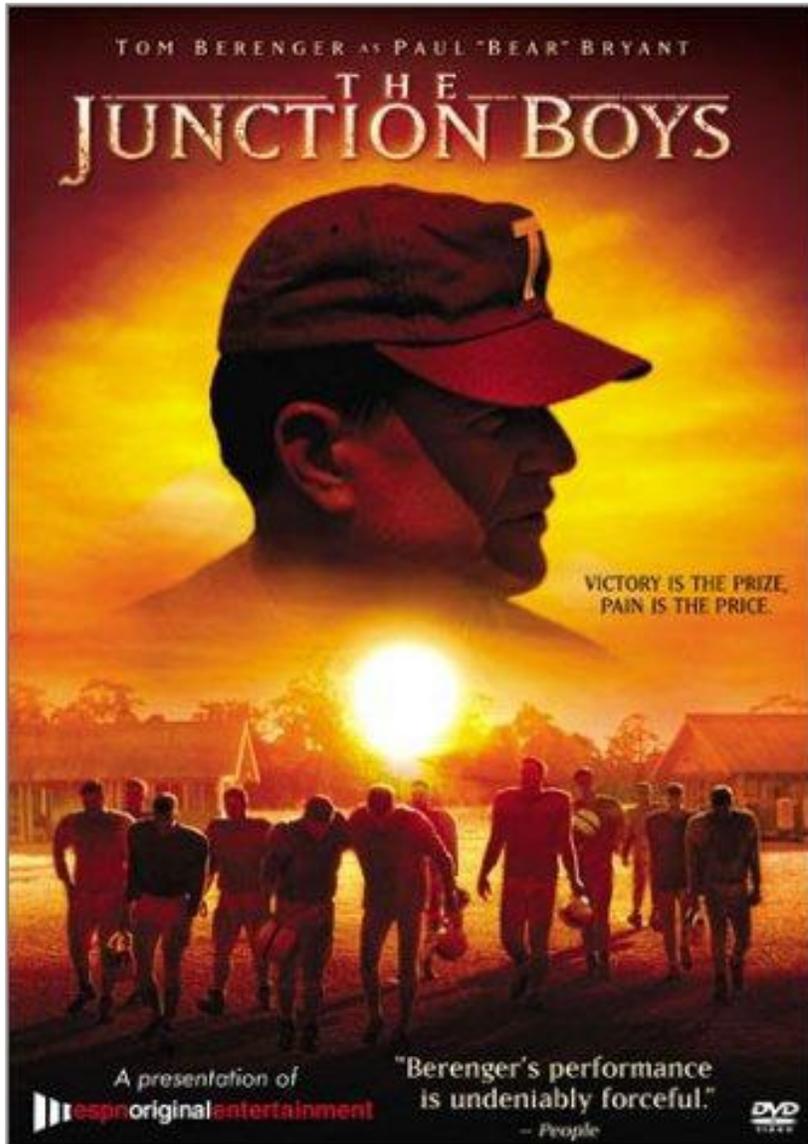
By [David Cobb](#) Jul 11, 2023 at 10:41 pm ET • 5 min read











- “He felt that many of the players on the team were weak and not properly trained or coached, and needed a camp away from the distractions on campus. He therefore arranged for a camp to be held in the small Hill Country town of Junction, where Texas A&M had a 411-acre (1.7-km²) adjunct campus.”
- “At the time of the camp, the Hill Country was experiencing a severe heat wave. According to the National Climatic Data Center, all 10 days of the camp took place in high temperatures, with a few days topping 100 °F.”
- “Practices began before dawn and usually lasted all day, with meetings in the evening until 11pm. The oppressive heat combined with the brutal practice schedule was too much for many of the players. Each day, fewer and fewer players reported for practice, as many quit the team from illness or disgust. The situation was compounded by Bryant's refusal to allow water breaks. This practice, now widely recognized as dangerous, was at the time commonly employed by coaches at all levels in an attempt to ‘toughen up’ their players. The only relief provided to the players were two towels soaked in cold water; one towel was shared by the offensive players, and one by the defense.”

Report: Cal swim, 2012 Olympic coach Teri McKeever accused of 'routinely bullying' athletes



Cassandra Negley

WNBA and women's college basketball reporter

Tue, May 24, 2022 · 4 min read



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"But in interviews with [Southern California News Group], 19 current and former Cal swimmers, six parents, and a former member of the Golden Bears men's team portray McKeever as a bully who for decades has allegedly verbally and emotionally abused, swore at and threatened swimmers on an almost daily basis, pressured athletes to compete or train while injured or dealing with chronic illnesses or eating disorders, even accusing some women of lying about their conditions despite being provided medical records by them.

"The interviews, as well as emails, letters, university documents, recordings of conversations between McKeever and swimmers, and journal entries, reveal an environment where swimmers from Olympians, World Championships participants and All-Americans to non-scholarship athletes are consumed with avoiding McKeever's alleged wrath. This preoccupation has led to panic attacks, anxiety, sleepless nights, depression, self-doubt, suicidal thoughts and planning, and in some cases self harm."

Cal fires longtime swimming coach Teri McKeever after spate of bullying, abuse allegations



Jason Owens

Staff writer

Tue, Jan 31, 2023 · 5 min read



750



Teri McKeever was fired as University of California women's swim coach on Tuesday after 29 years in charge. (AP Photo/Charlie Neibergall)

“The coaching profession is at a crossroads. The complaints made about Teri were largely the result of gendered differences in how she was judged as a female but also based on gendered evaluations of female athletes. The complaints were also the result of a lack of resources provided to help coaches manage the mental health challenges of athletes. Coaches are all at risk as they seek to walk the line of great coaching compared to what any disappointed athlete or parent can now claim is abuse.”

Rutgers settles with swim coach for \$725K, paying 3 times what it owed

Updated: Dec. 14, 2018, 2:13 p.m. | Published: Dec. 14, 2018, 2:01 p.m.



Thirteen months after parting ways with swimming and diving coach Petra Martin, Rutgers agreed to a settlement.

Facebook icon, Twitter icon, Bookmark icon, and Print icon.

347 shares

Northwestern's 'rampant' hazing was 'devastating' for athletes of color, ex-football players say

Northwestern hazing scandal includes former quarterback Lloyd Yates

THE ASSOCIATED PRESS





Some Thoughts

1. Clear language **applicable to all coaches** regarding institutional expectations for coach treatment of athletes/behavior of student athletes
 - Memorialize in contracts?
2. Reporting avenues!!! (**anonymous/annual required survey**)
 - The eyes and ears: Students/trainers/tutors
3. Careful investigations
4. There are more options than cancellation
5. Consistent application

Title IX and the New Rule on Transgender Athletes Explained

The Biden administration proposed a rule change that would allow schools to block some transgender athletes from competing on sports teams that match their gender identities.

 Give this article



The proposed rule would affect students in youth sports and in college. David Walter Banks for The New York Times

Senate Bill 15 requires NCAA, club, intramural athletes to compete based on their sex assigned at birth



[Lorianne Willett](#)

Merrick Zey, a transgender man and intramural athlete, said he may not compete in intramural sports after SB 15 takes effect.

HUSCH BLACKWELL



•“As president I sit over a number of dormant volcanoes. One of them is an athletic scandal. It blows up, it blows up the university, its reputation, it blows up the president.” -- University of Maryland President Wallace Loh

U-Md. president to retire in wake of football death





“Hypothetical”

- A coach learns that a student athlete was getting a massage and may have “exposed himself” to the masseuse and asked for “sexual” favors
- What do you want the coach to do?
- **Are you absolutely confident that the coach at your institution will do what you want them to do?**



Athletics Risk Management

1. Survey SAs and staff: do you know what and how to report?
2. Design system/training which recognizes reluctance to report
3. Mantra from leadership: “You are a reporter/not an investigator”
4. Ethical fading
5. Bystander intervention
6. Attitude: “Don’t tell me what I need to hear, tell me what I need to know.” → You need a Michael Burry on your team (yes people are a dime a dozen)
7. Be honest about your (and your staff’s) limitations and know when to ask for help.